Supreme Court, U.S.
FILED

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No._____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM RUSSELL AIKEN, et al
Petitioner(s)

v.

CITY OF MEMPHIS, TENNESSEE
Respondent

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether a public agency governed by the compensatory time provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. §207(o), and the Department of Labor's implementing regulations, may, absent an agreement defining "reasonable period" between the parties, refuse to grant an employee's request to use accrued compensatory time because granting the request would require the employer to pay overtime wages to a replacement employee, on the basis that the request was not submitted within a reasonable period when granting the request would cause no undue disruption to the employer's operation?

2) Whether the Sixth Circuit's decision to apply federal appellate caselaw regarding the compensability of on-call time to its decision concerning the City's Location While Ill Policy violates the FLSA has

resulted in the Court deciding a federal question in a way that conflicts with relevant decisions of this Court and with relevant Department of Labor regulations.

LIST OF PARTIES

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Michael	Arendale
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Richard	Bennett
Joseph	Benya
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Anthony	Bianchi
John	Binger
Richard	Birdsong
Bradley	Bland
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Holly	Bolden-Cooper
Martin	Boldt
Alan	Boone

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Patricia	Manning

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Jamie	Mayo
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Ernie	McCommon
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Gregory	McGaughy
Joseph	McIntosh
Larry	McKee
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Donald	Owens
Vennes	Owens
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Joseph	Pearlman
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Donald	Robinson
John	Roe
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Robert	Scoggins
Mark	Seay
James	Sewell
Robert	Shemwell
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Cecil	Shults
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Larry	Skaggs
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Glenn	Williams
Samuel	Williams
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Michael	Wilson
Octavia	Winfrey
Mark	Winters
Edward	Wood
Charles	Woods
James	Woods
Marvin	Woods
Shirley	Woods
James	Wooten
Theodore	Wooten
Joseph	Wright
Ernie	Writesman
Celia	Young
Jimmy	Young
Russell	Young
Robert	Young, Jr.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

WILLIAM RUSSELL AIKEN, et al., Petitioners

v.

CITY OF MEMPHIS, TENNESSEE, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

William Russell Aiken and other Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App., *infra* 1), is reported at *Aiken v. City of Memphis*, 190 F.3d 753, 139 Lab.Cas. P 33,957, 5 Wage & Hour Cas.2d (BNA) 961, 1999 Fed.App. 0320P. The opinion of the District Court (App., *infra* 3) is reported at *Aiken v. City of Memphis*, 985 F.Supp. 740, 135 Lab.Cas. P 33,668, 4 Wage & Hour Cas.2d (BNA) 408; and its ruling on summary judgment (App., *infra* 4) is unreported.

STATEMENT OF JURISDICTION

The Court of Appeals for the Sixth Circuit entered its judgment on September 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF STATUTES, ORDINANCES & REGULATIONS

29 U.S.C. §207(o) provides as follows:

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—
(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees . . . and
(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3). . . .

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and
(B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

29 C.F.R. §553.23 provides as follows:

(a)(1) As a condition for use of compensatory time in lieu of overtime payment in cash, section 7(o)(2)(A) of the Act requires an agreement or understanding reached prior to the performance of work. This can be accomplished pursuant to a collective bargaining agreement, a memorandum of understanding or any other agreement between the public agency and representatives of the employees. . . .

29 C.F.R. §553.25 provides as follows:

(c) Reasonable Period.

(1) Whether a request to use compensatory time has been granted within a "reasonable period" will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case. Such practices include, but are not limited to (a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff. (2) The use of compensatory time in lieu of cash payment for overtime must be pursuant to some form of agreement or understanding between the employer and the employee (or the representative of the employee) reached prior to the performance of the work. (*See* §553.23.) To the extent that the (conditions under which an employee can take compensatory time off are contained in an agreement or understanding as defined in §553.23, the terms of such agreement or understanding will govern the meaning of "reasonable period".

(d) Unduly Disrupt. When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (See H. Rep. 99-331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

29 C.F.R. §553.221 provides as follows:

(c) Time spent away from the employer's premises under conditions that are so circumscribed that they restrict the employee from effectively using the time for personal pursuits also constitutes compensable hours of work. For example, where a police station must be evacuated because of an electrical failure and the employees are expected to remain in the vicinity and return to work after the emergency has passed, the entire time spent away from the premises is compensable. The employees in this example cannot use the time for their personal pursuits.

(d) An employee who is not required to remain on the employer's premises but is merely required to leave word at home or with company officials where he or she may be reached is not working while on call. Time spent at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal pursuits. Where, for example, a firefighter has returned home after the shift, with the understanding that he or she is expected to return to work in the event of an

emergency in the night, such time spent at home is normally not compensable. On the other hand, where the conditions placed on the employee's activities are so restrictive that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable.

STATEMENT OF THE CASE

Petitioners, certain past and present City of Memphis (City) police officers, filed their initial suit on January 7, 1993, alleging that the City failed to pay them overtime wages in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. §201 et seq. During the litigation, Petitioners alleged that the City violated the FLSA by failing to pay them overtime compensation for: (1) time spent confined at home during sick leave or on-the-job injury leave under the City's "Location When Ill" policy; (2) time spent by canine officers commuting in police vehicles while transporting and controlling their dogs; (3) general time spent commuting in police vehicles and on vehicle maintenance; (4) training time; and (5) time spent on maintenance and care of police dogs. In addition, Petitioners alleged that certain practices followed by the City were in violation of the FLSA, including its compensatory time policy under which they are not allowed to take compensatory time off when a department supervisor

has decided that too many other officers have already signed up to be off on a particular day and its decision to treat police captains as exempt from overtime provisions of the FLSA.

I. Statement of Facts.

The Respondent, City of Memphis, is a political subdivision of the State of Tennessee and is a public agency subject to the provisions of the FLSA. 29 U.S.C. §203(e)(2)(C). The City and Petitioners negotiated a Memorandum of Understanding which provides that officers who earn overtime may request compensatory time off which will be given through the use of a log book. Under this plan, the officer who elects to receive compensatory time off in lieu of cash payment for overtime requests time off by signing his or her precinct's compensatory time off log book at any time within thirty days of the requested day off. Not all requests for compensatory time off were granted. For instance, the commanding officer of each precinct may close a precinct's log book after a determination is made that

further requests for time off would adversely affect the functioning of the unit. On many occasions, when Petitioners' requests to use accrued compensatory time were denied, they were told by their supervisors that the reason for the denial was because the Department would be required to replace them with off-duty officers who would have to be paid overtime. Thus the reason for the denial was because the City would have to pay replacement officers who were available and willing to work the overtime rate of pay.

The City enforces a "Location When Ill" (LWI) policy which regulates the off-duty activities of employees on leave for illness or on-the-job injuries. The LWI policy provides that during the time period in question, that "[a] member reporting sick or injured shall be confined to his or her residence, clinic, or hospital, except to visit his or her personal physician or by permission of his or her

supervisor."[1] Under this policy, employees using sick leave or on-the-job injury leave were confined to their residences 24 hours per day during each day on which leave was to be used and on weekend days which abutted those days. Petitioners, therefore, could not engage in any personal activity outside their home during the entire 24-hour period, even when they were physically incapable of performing rigorous police officer duties, but were capable of performing less strenuous activities such as grocery shopping, attending church services, etc. The City enforced this confinement policy with in-person and telephone checks every third day on the homes of those using sick or on-the-job injury leave.

II. Proceedings Below.

The District Court dismissed two of Petitioners' claims on summary judgment and entered final judgment in

[1] The LWI Policy is contained in Rule DR 1104 of the City's Police Department Regulations. After the commencement of this litigation, the City amended this rule to provide that it applies only during scheduled duty hours.

Favor of the City on three other claims.[2] In particular, the District Court granted the City's motion for summary judgment on Petitioners' claims that certain aspects of the City's sick leave policy violate the FLSA and that the Act requires the City to compensate canine officers for the time they spend commuting to work with their dogs. Next, following a pretrial conference, the parties submitted the remaining claims to the District Court for a decision based on trial memoranda, stipulations, and exhibits. The District Court eventually found in favor of the City on these claims as well.

On September 7, 1999, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's judgments, holding that (1) the City's policy of not allowing police officers to take compensatory time off when a department supervisor decided that enough officers had

[2] The claim regarding compensation for time spent on caring for canines was resolved through a compromise reached between the parties.

already signed up to be off on a particular day such that the department could not effectively function with any more people off did not violate the FLSA; (2) canine officers were not entitled to be compensated for canine commute time; (3) police officers were not entitled to compensation for time spent on cleaning and scheduled maintenance of police vehicles used by officers for commuting or for commute time in such vehicles; (4) the City's "Location When Ill" policy, which required officers to remain at home when on paid leave for illness or on-the-job injury unless they received permission to leave, did not violate the FLSA by failing to compensate officers on a 24-hour per day basis while they were confined at home; and (5) police captains were exempt from FLSA overtime requirements as salaried employees. This petition addresses the Sixth Circuit Court's holding regarding the first and fourth issues identified above.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED WITH REGARD TO COMPENSATORY TIME BECAUSE THE SIXTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT, ESPECIALLY IN LIGHT OF THE COURT'S DECISION TO ACCEPT REVIEW IN *CHRISTENSEN V. HARRIS COUNTY.*

In this case, as recognized by the dissenting opinion, the Sixth Circuit failed to determine that the City's policy of denying Petitioners' requests for compensatory time off if the request would require the Department to bring in a replacement officer at the overtime rate of pay is in direct violation of the FLSA and its implementing regulations. The governing statute, 29 U.S.C. §207(o)(5)(B), provides that an officer may take compensatory time off if two conditions precedent are satisfied: (1) that the employee must be permitted to use compensatory time off within a reasonable period after making the request; and (2) the use of the

compensatory time must not unduly disrupt the operations of the Department.

In order to determine whether Petitioners' requests satisfied the first condition precedent, it is necessary to examine the meaning of the term "reasonable period." One of the governing Department of Labor regulations provides that if there is an agreement governing the conditions under which an employee can take compensatory time off, "the terms of such agreement or understanding will govern the meaning of 'reasonable period.'" 29 C.F.R. §553.25(c)(2). Although the parties entered into a Memorandum of Understanding, it does not define the term reasonable period. However, this term is defined by Department of Labor regulation 29 C.F.R. §553.25(c)(1), as follows:

> (c) Reasonable Period. (1) Whether a request to use compensatory time has been granted within a "reasonable period" will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case. Such practices include, but are not limited to (a) the

> normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff. 29 C.F.R. §553.25(c)(1).

With regard to the second condition precedent, the term "unduly disrupt" is also defined by a Department of Labor regulation as follows:

> (d) Unduly Disrupt. When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (*See* H. Rep. 99-331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services. 29 C.F.R. §553.25(d).

At the trial court and on appeal, Petitioners argued that paying overtime wages to a replacement officer so that another can use banked compensatory time is not undue

disruption. Accordingly, Petitioners contended that the City's policy of closing the log books at the point at which overtime would have to be paid and not at the point of undue disruption constitutes a policy that violates the FLSA. This position is supported by *Heaton v. Moore,* 43 F.3d 1176, 1181 (8th Cir. 1994) (holding that "the eventual payment of overtime compensation cannot be deemed 'unduly disruptive.'"). Department of Labor commentary on the application of the FLSA provides further support:

> The Department recognizes that situations may arise in which overtime may be required of one employee to permit another employee to use compensatory time off. However, such a situation, in and of itself, would not be sufficient for an employer to claim that it is unduly disruptive.
> Application of the Fair Labor Standards Act to Employees of State and Local Governments, 52 Fed.Reg. 2012, 2017 (1987).

In this case, the majority opinion found that the parties had an agreement on the issue of compensatory time which provided for the conditions under which an employee

can use compensatory time off. *Aiken,* 190 F.3d at 757. The conditions provided for included that the precinct supervisor could close the log book once a certain number of officers requested a specific day off. On this basis, the Court found that there was an agreement between the City and Petitioners that the "reasonable period" for requesting the use of banked compensatory time begins thirty days prior to the date in question and ends when the log book is closed. *Id.* The court, which recognized that it was having difficulty reconciling 29 C.F.R. §553.25(c)(2) and 29 C.F.R. §553.25(d), then concluded that it would not interfere with the agreement reached between the parties. Accordingly, the court found that the City's policy did not violate the FLSA because the Petitioners' requests, which were submitted after the log book was closed, were not submitted in a reasonable period as defined in their agreement. *Id.*

The dissenting opinion chastises the District Court for "failing to come to grips" with Petitioners' argument that the

City's compensatory time policy violated the FLSA. *Aiken,* 190 F.3d at 764. As Judge Ryan succinctly observes:

> Instead of resolving this difficult, mixed question of fact and law, the district court merely held, as the majority opinion in this court does, that the entire issue is governed by the collective bargaining agreement between the parties, and the collective bargaining agreement has a provision as to the reasonable period within which time off may be requested. The district court's reasoning, although to me rather abstruse, apparently is that if an officer doesn't make a request for comp time early enough to assure that his replacement need not be paid time-and-a-half, then the officer will not have requested his time off within a reasonable period. The problem, of course, with that sort of reasoning is that in conflates the concept of the reasonable period within which the day off must be requested, and whether it is an undue disruption of the police department's operations to permit the time off to be taken. Thus, the plaintiffs' claim that the logbook is being declared full for a forbidden reason is never directly addressed. . . . The majority opinion likewise dodges the problem[.] . . .*Id.*

As further recognized by the dissenting opinion, the question of whether an employer's denial of a request for compensatory time off on the basis that the employer will

have to pay overtime wages to the replacement employee violates the FLSA has not been addressed by either the District Court or the Court of Appeals. Thus, in reaching their decisions, both Courts have departed from the usual course of judicial proceeding by failing to apply governing law and have reached a decision that conflicts with relevant federal statutory and regulatory law. Moreover, in this case, the majority had "some difficulty" in reconciling the provisions of 29 C.F.R. §553.25(c)(2), which provides that the meaning of "reasonable period" will be governed by the terms of any agreement between the employer and employee on the use of compensatory time, with 29 C.F.R. §553.25(d), which defines the expression "unduly disrupt." *Aiken,* 190 F.3d at 757 n.2.

Thus, the issue of whether an employer may deny an employee's request to use compensatory time off on the basis that it was not requested within a reasonable period as defined by the regulations and would require the employer to

pay overtime wages to the replacement employee is unsettled and should be decided by this Court.

This is especially true given the Court's decision to grant a petition for *writ of certiorari* in *Christensen v. Harris County,* 120 S.Ct. 320 (Oct. 12, 1999), limited to the question of whether a public agency governed by the provisions of the FLSA may, absent a pre-existing agreement, require its employees to use accrued compensatory time. When deciding this issue, the Court will most likely consider whether the employer can force its employees to use accrued compensatory time because it wants to avoid paying overtime wages in cash. Under these circumstances, although the facts are slightly different, the opinion reached in *Christensen* will likely have an impact on the *Aiken* Petitioners because the Court will be considering what impact an employer's desire to avoid paying overtime wages has upon its obligations under the compensatory time provisions of the FLSA.

II. THE PETITION SHOULD BE GRANTED WITH REGARD TO THE "LOCATION WHEN ILL" POLICY BECAUSE THE SIXTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

The City adopted a leave policy which required police officers to remain at home when on paid leave for illness or on-the-job injury. Here, the Sixth Circuit found that the City's failure to compensate officers for all waking hours they were confined at home under the City's leave policy did not violate the FLSA which requires an employer to compensate employees for time spent predominately for the employer's benefit. The Court found the question to be analogous to the question posed by cases considering the compensability of "on-call" time. *Aiken,* 190 F.3d at 760. For purposes of the FLSA, the Court held that the employee's free time must be severely restricted for off-time to be construed as work time. The Court found that the City's

policy was not so onerous as to prevent employees from effectively using time for personal pursuits, and did not transform recovery time into work. At home, officers were free to use their time as they pleased. Accordingly, the Sixth Circuit affirmed the District Court's dismissal of this claim.

It is Petitioners' contention that different standards apply to cases involving the compensability of time spent at home while subject to "location when ill" policies as opposed to those involving standby or on-call policies. Because of the differences between staying at home while on sick leave where you are not subject to call to return to work, and being on call where you may be requested to return to work, the tests established in measuring the impact of restrictions imposed on employees subject to standby or on-call policies do not perform as well in measuring the impact of restrictions imposed on employees subject to a "location when ill" policy that confines the employee to his or her home.

In reaching its decision on the basis of the on-call standard, the Sixth Circuit decided an important federal question in a way that conflicts with relevant decisions of this Court. Specifically, the Court's decision is contrary to two seminal United States Supreme Court cases, *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 151, 89 L.Ed. 124 (1944) and *Armour & Co. v. Wantock*, 323 U.S. 126, 133, 65 S.Ct. 165, 89 L.Ed. 118 (1944), which hold that time spent not engaged in actual work activities could be considered "hours worked" under the FLSA. By failing to follow the existing standards with regard to compensability for time spent not engaged in actual work activities established by these decisions, the Sixth Circuit has rendered a decision that is contrary to the standards established by this Court.

In addition, a Department of Labor regulation recognizes that "[t]ime spent at home on call may or may not be compensable depending on whether the restrictions placed on the employee preclude using the time for personal

pursuits." 29 C.F.R. 553.221(d). As recognized by this Court in *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), deference must be given to the Secretary of Labor's interpretation of the FLSA. Accordingly, time spent at home on call may be compensable under certain circumstances.

Moreover, unlike on-call cases, the question of whether an employee should be compensated for time spent while subject to location when ill has not been decided by this Court. Accordingly, the petition should be granted on the grounds that the Sixth Circuit opinion conflicts with relevant decisions of this Court and because this Court can settle this important federal question.

CONCLUSION

This case presents two issues of significant importance. First, this Court must settle the law regarding whether an employer, who seeks to avoid paying overtime wages to a replacement employee, may refuse to grant an

employee's request to use compensatory time on the basis that the request was not submitted within a reasonable period when the agreement between the parties does not specifically define the term reasonable period and when the employer's operations will not be unduly disrupted if the request is granted. Second, in seeming contradiction to this Court's decisions in *Skidmore* and *Armour*, the Sixth Circuit in this case has relied upon the test established in on-call cases to determine whether an employer is in violation for failing to pay overtime wages to an employee confined at home under a location while ill policy. The failure of the Court to apply the general principles set forth in *Skidmore* and *Armour* and the failure of the Court to accord deference to the Department of Labor's regulations is contrary to relevant decisions of this Court. For these reasons, the petition for *writ of certiorari* should be granted.

Respectfully submitted,

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